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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/649,614	08/28/2003	Stephen P. Craig	21591	5281

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EXAMINER

ALIMENTI, SUSAN C

ART UNIT PAPER NUMBER

3644

DATE MAILED: 07/27/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/649,614

**Applicant(s)**

CRAIG, STEPHEN P.

**Examiner**

Susan C. Alimenti

**Art Unit**

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 08 June 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8, 13-17 and 19 is/are rejected.
- 7) ☒ Claim(s) 9-12, 18 and 19 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Objections***

1. Claim 11 is objected to because of the following informalities: In line 2 of said claim the phrase "said last mentioned end" appears to refer to the "one end" of claim 10, line 2, however for clarification of subject matter it is suggested that "said last mentioned end" be changed to --said one end--, as there are indeed two ends of the slot-like member and the claimed subject matter should be specific as to what is being referred to. Appropriate correction is required.
2. Claim 19 is also objected to because of the following informalities: In line 3 is appears the phrase "slot-like member" should be changed to --slot-like member--. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.
4. Claim 19 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 19 recites the limitation "the exposed length" in line 2. There is insufficient antecedent basis for this limitation in the claim.

### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claim 1-8, 13-17 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Glassman (US 3,766,667).

Glassman discloses the claimed invention except it is not positively disclosed what type of material it is made out of. Glassman's device comprises a plurality of slat-like members, i.e. B-6, having therein a plurality of holes 30 on one side of the member. Pegs 12 are inserted into said holes 30 where desired by the user. Regarding claims 1, and 13-14, member B-6 has 6 holes wherein three pegs could be inserted into 3 of said holes, while the symmetrically opposite holes are left void. Regarding newly added claims 15, 16, and 19 each slat like member has a height, width and length (see Glassman, Figure 3), and the exposed length of pegs 12, as shown in Figure 7, is less than the width of the slat-like member B-5.

7. Regarding claims 3-5, and 7-8 when Glassman's device is oriented as seen in Figure 8, the moisture retaining means is defined as the indentation created by the combination of hole 30 and peg 12 (Glassman, Figure 8). Regarding claims 4, 8 and 10, said indentation is in the form of a depression, slanted downward and extends over at least *a substantial part* of the length of said slat-like member. Similarly regarding claims 5 and 7 the depression is symmetrical and curvilinear in shape.

8. Regarding the claim that the device is made of plastic (claim 1, line 4) through injection molding (claim 2, line 2), Glassman is non-specific as to the material in which his device is made from. It would have been obvious to one having ordinary skill in the art at the time the invention was made to make Glassman's device out of plastic, since it has been held to be within the

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general skill of a worker in the art to select a known material on the basis of it's suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

9. Regarding claim 6, Glassman discloses the claimed invention except the moisture retaining means is not triangular in shape. It would have been obvious to one having ordinary skill in the art at the time the invention was made to change the shape of pegs 12 and holes 30, since it has been held that there is no invention in merely changing the shape or form of an article without changing its function except in a design patent. Eskimo Pie Corp. V. Levous et al, 3 USPQ 23.

#### ***Allowable Subject Matter***

10. Claims 9-12 and 18 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Response to Arguments***

11. Applicant's arguments filed 8 June 2004 have been fully considered but they are not persuasive. First in response to applicant's argument that Glassman is nonanalogous art, the examiner respectfully disagrees and points out that the claims cite a "protective barrier arrangement to be placed between a plant pot and the supporting surface", clearly Glassman's construction/mathematical toys are capable of being utilized in such a way as suggested by the aforementioned claim, thus the argument towards nonanalogous art is moot.

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Further in response to the argument that the Glassman reference teaches away from the claimed subject matter, the examiner respectfully disagrees. All of Glassman's slat-like members B-1 through B-10 can be assembled in a variety of ways including but not limited to the arrangement described in the above rejection. The excerpts of the Glassman reference chosen by the Applicant to argue this point are mere suggestions by the inventor on how to use the device, but in no way limits other manipulations. Also, while Glassman's pegs are not directly connected, or integral with the slat-like member, the Examiner points out that this limitation is not recited in the claims. Glassman is considered to have a number of pegs *extending* on one side of a slat-like member that correspond to a similarly arranged number of holes on the other side of the slat-like member.

Applicant further argues that the Examiner "attempts to brush aside" (Arguments filed 6/8/04, p.9) the limitation of claim 1, lines 9-13, this however is not the case. The Examiner notes that in the above rejection it is explained that a slat-like member containing 6 holes in which 3 are left void on one side across the transverse axis, thus satisfying the limitations of the claim. The remainder of the above mentioned claim excerpt is largely functional language that Glassman's invention is capable of satisfying.

Regarding the material of construction, Applicant argues that it is not obvious to have made Glassman's device out of plastic, however the very reasons that Applicants lists as the benefits of using plastic (Arguments filed 6/8/04, p.10) e.g. ease of cleaning, are among the many reasons for motivation to use such a well-known material.

Finally regarding claim 6, Applicant argues that changing the shape of holes 30 and pegs 12 is not obvious and would change the function of the device. The Examiner again respectfully

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disagrees and notes that even if the pegs and holes were changed from a circular to a triangular shape they would still perform the same function of mating together to connect the slat-like members and form a continuous flat body.

In conclusion, for these and the above reasons, the Examiner maintains the rejections of claims 1-8, 13-17 and 19.

### *Conclusion*

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan C. Alimenti whose telephone number is 703-306-0360. The examiner can normally be reached on Monday-Friday, 9am-5pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael J. Carone can be reached on 703-306-4198. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

14. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SCA



MICHAEL J. CARONE  
SUPERVISORY PATENT EXAMINER